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No. 83-1911

IN THE

Supreme Court of the United States

October Term, 1984

CHRISTOPHER L. LOWE, LOWE PUBLISHING CORPORATION, LOWE MANAGEMENT CORPORATION and LOWE STOCK CHART SERVICE, INC.,

Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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REPLY BRIEF OF PETITIONERS

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ARGUMENT

I.

Licensing of Petitioners' Publishing Activities Cannot Be Premised on the Power to License Professions.

The Commission's argument rests on the erroneous premise that the legislative power to create and regulate professions as to any particular subject matter implies a

power to regulate and license those who merely write about and publish on that subject matter (see, e.g., Comm. Br. 10, 22-39, and 43-44). The error is that the legislature is prohibited by the First Amendment from determining what topics may be the subject of public discussion or who may be the speakers, *see, e.g., First National Bank of Boston* v. *Bellotti,* 435 U.S. 765 (1978), and cases cited at Pet. Br. 22-25. Congress cannot avoid that prohibition through the device of creating professions and then extending those professions to include writers and publishers.

The power to license professionals extends only to persons who render personal services or advice and cannot, under the First Amendment, include persons who merely publish. The power of the legislature to license, for example, persons who render personal psychological advice does not mean that the state can require a license of anyone who writes a book about human psychology or a magazine article on how to feel better. To take another example, one might suppose that Congress determined, not unreasonably, that billions of dollars in the United States are lost due to reliance of government, industry, securities traders, and other private people on faulty economic advice which in some cases was found to be fraudulent, and that therefore Congress created the licensed profession of "economic advisers." Petitioners readily acknowledge that persons rendering personal economic advice could be licensed, but it is inconceivable that Congress, by virtue of its power to regulate this profession, would then have the power to require Milton Friedman or Paul Samuelson—or Christopher Lowe—to be licensed as a precondition of publishing books, magazine articles or newsletters containing economic information, analysis and opinion.*

The power to regulate professions does not give the state power to regulate writings published about the subject matter of the profession. A person must be licensed to act as a lawyer, doctor or plumber. But he is free to publish a book on how to avoid probate or whether to take vitamin C for the common cold, or how to fix a leaking faucet, without the prior restraint of a license. If, as the Commission's brief argues, a legislature can use the power to regulate professions as a means of licensing those who merely publish, then virtually every subject matter and every publisher is potentially subject to licensing in the discretion of the legislature.** The First Amendment's protection afforded the press against government licensing, *see, e.g., Lovell* v. *Griffin,* 303 U.S. 444, 451-52 (1938), would disappear.

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* *Board of Regents* v. *Roth,* 408 U.S. 564 (1972), cited at Comm. Br. 26 for the proposition that there is no First Amendment right to practice a particular profession, suggests a further example. Roth was an assistant professor teaching political science, 408 U.S. at 566, and, as such, is concededly subject to professional licensing. But the state's power to license Roth could not possibly permit the state to license the publication of books—or newsletters—about political science.

** Although the Commission argues that by virtue of the newspaper exemption, the Court need not decide whether newspapers and news magazines could constitutionally be licensed if they publish investment advice (Comm. Br. 36 n. 46), nevertheless the Commission's "professionalization" argument would clearly extend Congressional licensing power over all publications choosing to publish such material. If Congress's power to professionalize a subject implies Congressional power to license those who write about that subject, then notwithstanding the First Amendment, newspapers and news magazines as well as newsletters and books can be licensed, subject only to whatever distinctions among publishers Congress might decide to make.

The distinction between the rendition of personal advice or services and constitutionally protected publication is based on the difference between private individualized communication for compensation and public discussion. The professional, for compensation, renders a service to particular individuals with respect to their particular problems. His activity is of limited significance to the public at large. But the person who publishes his opinions contributes directly to the great marketplace of ideas, whether those ideas involve political science, gardening, astrology or investments or any other subject in which the public is or may be interested.* The personal adviser addressing the particular problems of particular clients, gains trust and confidence by virtue of the personal relation he has with his clients. An impersonal publisher, however, competing with hundreds or thousands of other voices in the public arena, gains his readership's loyalty, if any, by the ability of his ideas to withstand the rigors of the marketplace of ideas.**

The Commission therefore errs when it claims that Christopher Lowe's position is no different than that of a

* That publications may be sold for a profit does not remove them from First Amendment protection. *E.g., Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501-02 (1952).

** The distinction between personal advice and impersonal publishing does not rest on the numbers of clients or readers (see Comm. Br. 35). One's right to First Amendment protection is not determined by the popularity or persuasiveness of the views and opinions he expresses. Correspondingly, a person rendering personal advice may not escape the force of regulation by being so successful or so vigorous in his activity as to have a large number of clients. *The distinction is whether the speaker is tailoring his advice to the particular concerns and needs of his particular clients, or whether he is publishing facts and opinions to the world at large, without regard to the particular situation of particular readers.*

lawyer, doctor or other professional who continues to practice notwithstanding revocation of his license (Comm. Br. 23). Of course Lowe could not continue to render personal investment advisory services. But by virtue of his First Amendment rights, Lowe is entitled to participate in public discussion of ideas and matters of public interest. He is free to publish impersonally his opinions about securities, just as a disbarred lawyer, or even a nonlawyer, *see, e.g., New York County Lawyers' Association* v. *Dacey*, 21 N.Y.2d 694, 287 N.Y.S. 2d 422 (1967), is free to publish his views, advice and opinions about legal matters.*

The Commission repeatedly argues that Congress intended to regulate newsletter publishers under the Act (*E.g.*, Comm. Br. 10, 12, 15-17, 32-33). But it is constitutionally irrelevant whether Congress intended that investment newsletter publishers be deemed "investment advisers" or that they be subject to fiduciary standards. The concern here is not the *intent* of Congress but whether Congress has the *power* under the First Amendment to subject to licensing those who merely impersonally publish their views and opinions about a matter of legitimate public interest. Such publishing activities constitute pure First Amendment speech. Since Congress has no power to determine who may and who may not speak, Congress has no power to subject publishers to the licensing requirements of the Act, regardless of whether Congress intended to categorize the publishers as investment advisers, fiduci-

* The regulatable distribution of advice by members of the bar to clients based on recent developments without tailoring the advice to clients' individual needs (see Comm. Br. 34 n. 44) is incidental to the rendering of personal services to those clients. But case law is clear that a person not rendering or offering to render personal legal services who distributes advice based on developments in a particular legal area cannot be deemed to be practicing law, *e.g.*, *Dacey*.

aries or anything else, *cf. NAACP* v. *Button*, 371 U.S. 415, 429 (1963) ("a State cannot foreclose the exercise of constitutional rights by mere labels").

Thus the Commission's heavy reliance on *SEC* v. *Capital Gains Research Bureau*, 375 U.S. 180 (1963) (Comm. Br. 13, 14, 15, 16, 17, 18, 19, 20 and 32) is misplaced. The issue there was only the interpretation of the statute based on Congressional intent. Without consideration of First Amendment issues, the Court in *Capital Gains* found that Congress intended that publishers of investment advice be investment advisers and that they be governed by fiduciary standards under the Act. Petitioners do not argue that proposition.* The question now raised is not one of statutory interpretation and congressional intent, but one of Congressional power under the First Amendment, a question not reached in *Capital Gains*.

Similarly, the Commission's quotations from *Savage* v. *CFTC*, 548 F.2d 192 (7th Cir. 1977) (Comm. Br. 30, 31) merely reflect an interpretation of Congressional intent. That intent is not relevant in deciding whether the Act's licensing scheme violates the constitutional protection for pure First Amendment speech.**

* Whether Congress created, or recognized, investment advisers as "professionals" is less clear than the Commission argues. One essential characteristic of a professional has traditionally been "a certain degree of skill and learning upon which the community may confidently rely. . . ." *Dent* v. *West Virginia*, 129 U.S. 114, 122 1889). The Act, however, has no requirement of skill, learning or other indication of expertise.

** *Savage* denied review of the CFTC's order refusing to register Savage as a "commodity trading advisor [sic]." Savage published his commodity newsletter in connection with his activities as a commodity trader and advisor, and had personal contact with clients, 548 F.2d at 194, and the court assumed that Savage's newsletter was commercial speech, *id.* at 197. The court did not suggest that the newsletter should be so characterized, or that its publication could be enjoined, if publishing had been Savage's only activity.

It must be added that although Congress included publishers within the definition of investment adviser, the legislative record was inadequate to explain Congress's action under the First Amendment. Petitioners agree with the Commission that the Act was a product of the Commission's study of the investment company and investment trust industries (see Comm. Br. 14). But the Commission fails to note that that study "was intended to exclude any person or organization which was engaged in the business of furnishing investment analysis, opinion or advice solely through publications distributed to a list of subscribers, and did not furnish specific advice to any client with respect to any securities, ..." H.R. Doc. No. 477, 76th Cong., 2d Sess. 1 (1940). Moreover, the more than one thousand pages of legislative hearings, including testimony from leading investment advisers apparently intending to eliminate "fringe" elements of the profession*—reveal no abuses by any publishers of newsletters. The "dangerous potentialities" referred to in the memorandum that the Commission submitted to Congress (Comm. Br. 15 n. 14) were no more than vague generalizations. And that memorandum** forcefully argued the constitutional impermissibility of the Act's scheme for licensing publishers.

Contrary to the Commission's contention (Comm. Br. 33-34), petitioners' argument does not require the invalidation of a wide variety of licensing schemes. The only invalidation that petitioners seek is the invalidation of

* *See Hearings on Investment Trusts and Investment Companies, S.3580, Subcommittee of the Senate Committee on Bankruptcy and Currency*, 76th Cong., 3d Sess. 756-57, 743 (1940); *see also* H.R. Doc. No. 477, 76th Cong., 2d Sess. 27-28 (1940).

** The memorandum is quoted extensively at pp. 6-9 of the brief of amicus American Civil Liberties Union.

Congress's attempt to license and thereby restrain persons engaged solely in the constitutionally protected activity of publishing. Petitioners do not seek to invalidate any licensing or other regulation with respect to persons rendering personal investment advice or any other kind of personal advice or service.

The traditional personal-impersonal distinction between professionals and publishers is not difficult to apply, as the brief of amicus North American Securities Administrators Association, Inc. ("NASAA") contends (NASAA Br. 21-22). Advice to individual clients based on their own situations is personal. Advice to the public through the medium of a newsletter is impersonal.*

Moreover, the argument of NASAA on this issue is particularly puzzling. Despite the NASAA brief's concern for state blue sky regulation of newsletter publishers and its challenge to the personal-impersonal distinction, NASAA has strongly supported excluding newsletter publishers, and all other impersonal publishers, from investment adviser regulation under the Uniform Securities Act on the ground that their advice is general and remedies other than licensing are available to punish misconduct.*

* The hypotheticals posed by NASAA, *id.*, are readily resolved. Tape recorded messages not tailored to particular callers' problems are impersonal. Although Judge Weinstein in the district court disagreed (Pet. App. A67), his view was questioned by the court of appeals majority (Pet. App. A8). As for the talk show host who (presumably for compensation) answers specific questions from listeners, he is engaged *both* in personal activity, because he is giving specific advice directly to specific listeners, and in impersonal publication of his views, because he is disseminating them to the public at large. Whether the speaker could be regulated depends on a determination of whether the personal advice is a subordinate component of the speaker's activities. Since the speaker could convey the same opinion and information using hypothetical examples, petitioners suggest that the First Amendment would not be infringed if the speaker, to the extent he gave specific personal advice for compensation, were subject to regulation.

Ultimately, the Commission's professionalization argument is no more than a claim that Congress has discretion and power to select particular subject matters as to which the Government can determine who may speak to the public and who may not.** But the First Amendment disqualifies

* On October 14, 1981 NASAA adopted proposed amendments to the Uniform Securities Act ("U.S.A."), 1 Blue Sky L. Rep. (CCH) 1502). Among these is the following amendment expanding the newspaper exclusion contained in the definition of "investment adviser" in U.S.A. § 401(f), *id.* at ¶ 5541, to exclude newsletters:

> In Sec. 401(f), substitute for (4) through (7) as follows:
>
> "(4) a publisher of any newspaper, news column, newsletter, news magazine, or business or financial publication or service, whether communicated in hard copy form, or by electronic means, or otherwise, that does not consist of rendering of advice on the basis of the specific investment situation of each client; or other financial institutions or institutional buyers, whether acting for themselves or as trustees; . . . ."

1 Blue Sky L. Rep. (CCH) ¶ 5541.05. The reasons stated by NASAA for the proposed change are as follows:

> The exclusion [in section 401(f)(4)] pertaining to securities advisory publishers is expanded to include newsletter publishers who do not give advice to subscribers on the subscriber's specific investment situation. Because of the general nature of publishers services, and the fact that the anti-fraud provisions apply to publishers even if excluded, the exclusion was expanded.

Id.

** Except for its "professionalization" argument, the Commission does not claim that the Act's licensing standards comply with constitutional restrictions on prior restraint of pure First Amendment speech. However the Commission, erroneously, dismisses as in-

(footnote continued on next page)

Congress from prohibiting speech on any particular subject matter or from choosing who may be the speakers. *See, e.g., Carey* v. *Brown*, 447 U.S. 455, 462 (1980); *First National Bank of Boston* v. *Bellotti, supra.* The "professionalization" of publishers provided by the Act is simply the licensing of the press prohibited by the First Amendment.

II.

Licensing of Petitioners' Publishing Activities Cannot Be Premised on the Argument That the Act Is a General Regulatory Statute or that the Act Only Incidentally Touches on Speech.

As applied to publishers, the registration provisions of the Act are not a general regulatory statute as the Commission argues (see Comm. Br. 35, 39). They are not like a ban on secondary picketing or an antitrust law (see Comm. Br. 24). They do not apply to all businesses or even to all publications. The registration provisions are specifically directed at control of speech and constitute content-based regulation applied selectively to two classes. One is personal investment advisers, whom Congress can

substantial, petitioners' argument that the Act vests the Commission with an impermissible degree of discretion (Comm. Br. 22 n. 30). The Commission's discretion under the Act no more "provides additional protection to those in petitioners' position", *id.*, than does the discretion given to a police commissioner to permit First Amendment activity that a local ordinance otherwise prohibits. Whether or not the public interest standard satisfies restrictions on delegation of legislative authority or requirements of due process, discretion to license the press limited only by the public interest standard is not sufficiently precise, or sufficiently tailored to legitimate state concerns, to withstand First Amendment scrutiny.

indeed license. The second is publishers impersonally publishing investment information and opinion, who are fully protected by the First Amendment's prohibition on prior restraint.

Nor can the registration provisions of the Act be sustained on the ground, urged by amicus NASAA (NASAA Br. 12-16) that they are not related to petitioners' expressive liberty and that they do no more than "touch on" speech as an incidential part of otherwise unlawful conduct. Petitioners are engaged in no activity other than publishing. Apart from the registration requirements of the Act, petitioners are not engaged in any conduct claimed to be unlawful.* Requiring a license of petitioners solely because they publish a certain type of information and opinion is directly related to petitioners' expressive liberty, and a statute prohibiting them from publishing doesn't merely "touch on" speech: it squashes speech.

III.

Licensing of Petitioners' Publishing Activities Cannot Be Premised on Commercial Speech Doctrine.

The Commission concedes that petitioners' publications do not meet what the Commission calls "the more narrow definitions" that the Court has "sometimes" used in referring to commercial speech (Comm. Br. 40). Indeed the

* Amicus NASAA also erroneously suggests (NASAA Br. 11) that petitioners' publishing is a mere subterfuge for the continuation of their personal advisory business. The record, however, is devoid of any indication that subsequent to the Commission's order of May 1981 any petitioner has rendered or offered to render any personal investment advice to any client or potential client.

Commission does not show that petitioners' publications fit within any definition that the Court has ever used in referring to commercial speech.

Petitioners' publications do not serve the same societal purpose as commercial speech, as the Commission argues (Comm. Br. 41). A disinterested publisher's speech about commercial transactions is not the same as a seller's speech that proposes that the reader purchase the seller's wares or services. Commercial speech is regulated not because it relates to commercial transactions, but because it is advertising. Advertising is part of the speaker's effort to sell his own product and may be regulated as a subordinate part of his sales activity, particularly because the advertiser has extensive knowledge of his own products and therefore can maintain the truthfulness of his speech, and because advertising, by virtue of the speaker's interest in making the sale, is a hardy form of expression. *See Central Hudson Gas & Electric Corp.* v. *Public Service Commission*, 447 U.S. 557, 564 n. 6 (1980).

In apparent recognition that petitioners' publications do not fall within the Court's commercial speech definitions and analysis, the Commission ultimately falls back on the predominating argument of its brief, the assertion that petitioners are professionals (Comm. Br. 43 n. 56). But calling petitioners "professionals" by virtue of the Act merely begs the question, since the issue is not what Congress decided to call this type of publisher, or what restrictions Congress intended to impose on them, but whether Congress has the constitutional power to license them.

Because the Commission ultimately relies on Congressional intent to validate Congressional power, the Commission's brief is unable to distinguish, on First Amendment grounds, commentary in such publications as *Consumer Reports* and *Motor Trend* from commentary in petitioners' publications (see Comm. Br. 43). The Commission's view that the government has a higher interest in the exchange of information about securities than about ordinary consumer products (Comm. Br. 43 n. 56) may or may not be correct. One may suppose that the Commission's view is not shared by the Consumer Product Safety Commission or the Federal Trade Commission. In any event, the extent or relative weight of any supposed government interests in regulating one type of consumer product as distinct from another is not significant. Whether or not Congress is more concerned with securities than with children's sleepwear or automobile safety, the First Amendment requires protection from the prior restraint of licensing for impersonal publications regarding matters in which the public has or may have a legitimate interest.

Moreover, even under a commercial speech analysis, the Commission fails to show that petitioners' newsletters can be totally suppressed. The Commission does not argue that there is any misrepresentation or deception in those publications (see Comm. Br. 42 n. 54). Nothing in petitioners' publications is shown to be inherently conducive to over-reaching or to other forms of misconduct, and no showing is made of any likelihood that those publications will deceive the public more than they will inform the public (see Comm. Br. 46). Nor does *Friedman* v. *Rogers*, 440 U.S. 1 (1979) (Comm. Br. 47) permit a total ban on petitioners' publications even if they are assumed, *arguendo*,

to be commercial speech. *Friedman* approved a ban on the use of trade names, but the Court carefully noted that the ban did not, and could not, extend to the informational aspect of optometrists' advertising such as information about the price and nature of the services offered, 440 U.S. at 16. Even if petitioners' newsletters were analyzed as though they were mere advertising, they would be entitled to the full protection afforded commercial speech because they concern lawful activity and are not misleading. *See Central Hudson Gas,* 447 U.S. at 566. In light of the multiplicity of post-publication remedies available if misconduct were to occur,* the remedy of total prohibition of future publication of newsletters never found to have been misleading would be grossly disproportionate to the effectuation of any proper government interest, and therefore cannot be sustained.

IV.

The Court Should Invalidate the Registration Provisions of the Act As Applied to Publishers.

If the Court concludes that, as applied to publishers, the registration provisions of the Act are unconstitutional, petitioners ask that the Court invalidate the registration provisions as so applied. The Court should not merely invalidate the revocation and bar provisions and uphold the requirement that publishers nevertheless register, as the Commission suggests (Comm. Br. 25 n. 31). To do so

* The Commission, at Comm. Br. 36, citing Pet. Br. 37-38, misstates petitioners' position on the remedy of disclosure of Lowe's past misconduct. Petitioners only contended that where *advertising* has been found to be misleading, disclosure in future advertising has been found to be a proper remedy.

would be implicitly to decide an important and difficult constitutional question that is not necessary to a disposition of this case and that is not adequately presented by the record. That question is whether Congress may enact an automatic disclosure-oriented registration requirement as applied to publishers. Such cases as *Talley* v. *California,* 362 U.S. 60 (1960) and *Thomas* v. *Collins,* 323 U.S. 516 (1945), and the strong aversion of the Founders to any form of press licensing, *see Lovell* v. *Griffin,* 303 U.S. at 451-52, strongly suggest that the validity of such a requirement would be far from clear. To decide the question would require an examination, in light of the heavy presumption against *any* system of prior restraint, of the government's interest, the need for such a provision, the adequacy of alternatives, the effect of the particular elements of disclosure required, and the impact of such registration on the exercise of First Amendment activity.

Congress did not consider those factors nor was the validity of such a registration requirement litigated below. The act that Congress considered and adopted, and that petitioners were charged with violating, imposes a different licensing scheme, one involving discretionary licensing and past misconduct as a ground for denial or revocation. Since there is nothing in the legislative record to show that Congress considered an automatic disclosure-oriented registration requirement, the Court should not rewrite the Act to create one. If the Act as applied to publishers is unconstitutional, it is for Congress to decide whether to adopt a new narrowly drafted enactment. If such a new registration requirement is enacted, the courts will then be able to examine that statute on an appropriate legislative record and an appropriate litigated record.

Conclusion

For the foregoing reasons and those set forth in the Brief of Petitioners, the judgment of the court of appeals should be reversed.

Dated: December 28, 1984

Respectfully submitted,

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